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Jonathan Jeung-Meng Fork

PRO-CHOICE: ACHIEVING THE GOALS OF THE INTERNATIONAL CRIMINAL COURT THROUGH THE PROSECUTOR'S *PROPRIO MOTU* POWER

JONATHAN JEUNG–MENG FORK*

Abstract: This Comment examines the *proprio motu* power of the International Criminal Court's Prosecutor through the lens of a recent decision to permit the court's Prosecutor to investigate potential crimes against humanity in the Republic of Kenya. After a deeply contested election in 2007, violence exploded across the country leaving many civilians hurt or dead. The Prosecutor asked the court to permit him to open an investigation, a first in the ICC's history, where most investigations are initiated through a request from either a State Party or the Security Council. While the use of the *proprio motu* initiative is deeply controversial, this Comment proposes that this prosecutorial power is essential in achieving the goals of the ICC: to end impunity for crimes against humanity.

INTRODUCTION

On March 31, 2010, Pre-Trial Chamber II of the International Criminal Court (ICC), the judicial body created by the United Nations General Assembly to try crimes of international concern,[1] authorized its Prosecutor to proceed with an investigation into potential crimes against humanity in the Republic of Kenya.[2] After a deeply contested election in 2007, violence exploded across the country—previously one of the most developed and stable nations in Africa—leaving more than 1,100 people dead and hundreds displaced from their homes.[3] The Majority found that the post-election violence fell within the jurisdictional

* Jonathan Jeung-Meng Fork is a Staff Writer for the *Boston College International & Comparative Law Review.*

[1] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 15–18 (3d ed. 2007).

[2] Situation in the Republic of Kenya, Case No. ICC–01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (*Kenya Situation*), ¶ 73 (Mar. 31, 2010).

[3] *See* Marlise Simons, *Int'l Court Authorizes Inquiry of Kenyans Linked to 2007 Political Clashes,* N.Y. TIMES, Apr. 1, 2010, at A12; Jeffrey Gettleman, *Disputed Vote Plunges Kenya into Bloodshed,* N.Y. TIMES, Dec. 31, 2007, at A1 [hereinafter *Disputed*].

parameters of the ICC and permitted the Prosecutor to commence an investigation.[4] Judge Hans-Peter Kaul's dissent, however, differentiated between international crimes "of concern to the international community," which the ICC was formed to address,[5] and common crimes "prosecuted by national criminal justice systems."[6] He argued that the post-election violence in Kenya did not rise to the level of an international crime so as to trigger the jurisdiction of the court.[7] The decision is notable because it is the first case in the ICC's history where the Prosecutor has decided to investigate potential crimes on his own authority, exercising his statutory *proprio motu*[8] power, rather than investigating situations referred to him through the United Nations Security Council or from other national governments.[9]

Part I of this Comment provides background information on the 2007–2008 post-election violence in Kenya. Part II places the Prosecutor's *proprio motu* power into historical and procedural context, describes how the Majority and Dissent interpreted these powers, and finally summarizes how they analyzed the law to arrive at their differing conclusions. Part III focuses on the impact of this decision on the ICC and suggests that reading the statute broadly to grant the Prosecutor leeway to pursue *proprio motu* investigations advances the ICC's mission to prosecute the gravest of international crimes.

I. Background

The general election of 2007 has been described as "the greatest test yet of Kenya's young, multiparty democracy," and "the tightest race in the country's history."[10] The incumbent, Mwai Kibaki, despite being praised as an economics expert, had long been criticized for favoring his own tribe, the Kikuyus, membership in which has traditionally been

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[4] *See Kenya Situation,* Case No. ICC–01/09, ¶ 73.

[5] *See* Rome Statute of the International Criminal Court art.1, July 17, 1998, 2187 U.N.T.S. 3, 37 I.L.M. 1002 [hereinafter Rome Statute].

[6] Situation in the Republic of Kenya (*Kenya Dissent*), Case No. ICC–01/09, Dissenting Opinion of J. Hans-Peter Kaul ¶ 8 (Mar. 31, 2010).

[7] *Id.* ¶ 72.

[8] *Ex proprio motu* is a Latin phrase meaning "of one's own accord." Black's Law Dictionary 662 (9th ed. 2009).

[9] *See* Simons, *supra* note 3.

[10] Jeffrey Gettleman, *Kenyans Vote in Closely Contested Presidential Election,* N.Y. Times, Dec. 28, 2007, at A3 [hereinafter *Kenyans Vote*].

indicative of belonging to Kenya's social elite.[11] Kibaki's opponent, Raila Odinga, a member of the Luo tribe, ran as a populist and campaigned on behalf of the poor, promising to distribute Kenya's growing prosperity more equitably.[12] Early reports suggested that Odinga had gained a lead,[13] but as the vote count progressed, splitting straight along tribal lines, his lead diminished rapidly amid cries of electoral misconduct and growing unrest in Nairobi's vast shantytowns.[14] Finally, despite accusations that it had ignored glaring irregularities, Kenya's election commission declared Kibaki the winner, sparking ethnic violence in the capital that quickly spread to the rest of the country.[15]

While subsequent investigations into the causes and scope of the upheaval suggested that the violence was predominantly a spontaneous reaction to the election results, a United Nations report found that "the actual patterns of violence varied from one region to the next."[16] The U.N. investigators discerned three patterns of violence.[17] The first, seen most obviously in the looting of houses and shops in the slums of Nairobi and Kisumu by various youth groups, seemed spontaneous to most observers.[18] The investigators attributed this pattern of violence to the "cumulated frustrations generated by poor living conditions and historical disenfranchisement" suffered by Odinga's supporters and unleashed as a result of the alleged election fraud.[19] The U.N. investigators identified a second pattern of violence where Odinga's supporters targeted "communities of small farmers and land-holders perceived to be [Kibaki] supporters in the Rift Valley and aimed at driving and keeping them away from the region."[20] The U.N. report claimed that "cred-

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[11] *Id.*; Jeffrey Gettleman, *Riots Batter Kenya as Rivals Declare Victory,* N.Y. Times, Dec. 30, 2007, at A3 [hereinafter *Riots*]; Jeffrey Gettleman, *With Half of Vote Counted, Kenyan Opposition Is Poised to Sweep,* N.Y. Times, Dec. 29, 2007, at A9 [hereinafter *Vote Counted*].

[12] *See Vote Counted, supra* note 11.

[13] *See id.*

[14] *Riots, supra* note 11.

[15] *See Disputed, supra* note 3.

[16] U.N. High Comm'r for H.R., *Report from OHCHR Fact-finding Mission to Kenya, 6–28 February 2008,* 3, http://www.ohchr.org/Documents/Press/OHCHRKenyareport.pdf (last visited Jan. 28, 2011) [hereinafter *OHCHR* Report]. The Prosecutor used the *OHCHR* Report as one of many human rights reports examining the post-election crisis in Kenya as support for his request to authorize an investigation into the situation in Kenya. *See generally ICC Request for Authorization of an Investigation Pursuant to Article 15,* Int'l Crim. Ct. (Nov. 11, 2009), http://www.icc-cpi.int/NR/exeres/90D5D0C1–0DEA-4428-BDB5–9CBCC7C9D590.htm (listing the annexes the Prosecutor used for support).

[17] *OHCHR* Report, *supra* note 16, at 3.

[18] *See id.*

[19] *Id.*

[20] *See id.*

ible evidence" suggested that this violence was partially organized by local political or traditional leaders.[21] The final pattern of violence, the investigators claimed, occurred later and was described as "retaliatory."[22] Reprisals targeting migrant workers, who were thought to be Odinga supporters, were reportedly carried out by Kibaki supporters and militia in a variety of regions.[23] These alternative characterizations of the post-election violence—as either spontaneous or directed—could have divergent implications for the ICC's jurisdiction.[24]

II. Discussion

A. *The Prosecutor's* Proprio Motu *Power*

The Rome Statute created the Office of the Prosecutor to be an independent and "separate organ" of the court "responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the [c]ourt."[25] The Office also examines these referrals, conducts investigations, and prosecutes cases before the ICC.[26] It is headed by the Prosecutor—currently Argentinean Luis Moreno-Ocampo[27]—who is assisted by Deputy Prosecutors.[28] Both the Prosecutor and his Deputies are elected secretly by an absolute majority of signatories to the Statute in an Assembly of States Parties, though Deputy Prosecutors are selected from a list submitted by the Prosecutor.[29] Both officers serve for nine years, unless a shorter term is designated, and are not eligible for re-election.[30]

Article 15 of the Rome Statute states that "[t]he Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the [c]ourt."[31] This provision proved particularly controversial during the drafting process.[32] Both supporters

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[21] *Id.*

[22] *Id.*

[23] *See OHCHR* Report, *supra* note 16, at 3.

[24] *See* Rome Statute, *supra* note 5, art. 7(2)(a) (defining "attack directed against any civilian population" as one that must be "in furtherance of a State or organizational policy to commit such attack").

[25] *Id.* art. 42(1).

[26] *See id.*

[27] *Office of the Prosecutor,* Int'l Crim. Ct., http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor (last visited Jan. 28, 2011).

[28] *See* Rome Statute, *supra* note 5, art. 42(2).

[29] *Id.* art. 42(4).

[30] *Id.*

[31] *Id.* art. 15(1).

[32] *See* Schabas, *supra* note 1, at 160–61.

and opponents of the idea of an independent Prosecutor "feared the risk of politicizing the [c]ourt and undermining its credibility."[33] Opponents argued that the Prosecutor would target highly sensitive political situations, or be beholden to powerful states or other groups that would attempt to use the ICC as a bargaining chip in political machinations.[34] Supporters claimed that confining the Prosecutor's independence to "situations identified by overtly political institutions like states [or] the Security Council" would reduce the credibility of the entire court.[35] The drafters therefore adopted a balanced approach that "rendered the *proprio motu* power of the Prosecutor . . . acceptable."[36]

Thus, after the Prosecutor determines that there is a "reasonable basis to proceed with an investigation," he must submit a request to the Pre-Trial Chamber to authorize an investigation.[37] The Chamber, after concluding that there is both "a reasonable basis to proceed with an investigation" and that "the case appears to fall within the jurisdiction of the court," will authorize the investigation.[38] In this way, there would be a measure of judicial oversight of the Prosecutor's independence that would "prevent the Court from proceeding with unwarranted, frivolous or politically motivated investigations that could have a negative effect on its credibility."[39]

Once an investigation is authorized, the Prosecutor has both duties and powers.[40] He is required "to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility . . . and, in doing so, investigate incriminating and exonerating circumstances equally."[41] He is empowered to conduct investigations in the territory

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[33] Situation in the Republic of Kenya, Case No. ICC–01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (*Kenya Situation*), ¶ 18 (Mar. 31, 2010); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court,* 97 Am. J. Int'l L. 510, 513–514 (2003) (arguing that the threat of a politicized Prosecutor is constrained by several methods of accountability and that transparent prosecutorial guidelines could enhance both the Prosecutor and Court's legitimacy).

[34] *See* Danner, *supra* note 33, at 513. The United States took a particularly strong position against an independent Prosecutor, claiming that groundless complaints would inundate the office and reduce its effectiveness. *See id.* at 514.

[35] *See id.*

[36] *See Kenya Situation,* Case No. ICC–01/09, ¶ 18.

[37] Rome Statute, *supra* note 5, art. 15(3).

[38] *See id.* art. 15(4).

[39] *See* Situation in the Republic of Kenya (*Kenya Dissent*), Case No. ICC–01/09, Dissenting Opinion of J. Hans-Peter Kaul ¶ 15 (Mar. 31, 2010).

[40] *See* Rome Statute, *supra* note 5, art. 54; Schabas, *supra* note 1, at 248.

[41] Rome Statute, *supra* note 5, art. 54(1)(a). Schabas argues that the wording suggests a Prosecutor with a high level of neutrality is more reminiscent of the "investigating magis-

of a State Party after securing its cooperation,[42] or without a State's cooperation after the Pre-Trial Chamber issues permission.[43] Finally, the Prosecutor may collect and examine evidence; request the presence of or question people involved with the investigation; and seek the cooperation of any State or intergovernmental organization.[44] Once an investigation is authorized, however, a full prosecution is not guaranteed.[45] Cases are inadmissible when they are being investigated or prosecuted by a State that has jurisdiction over it, in which case, the Prosecutor must defer to that State's investigation unless the Pre-Trial Chamber authorizes a continuation.[46]

B. *The Majority's Analysis*

At the outset, the Majority concluded that both the Chamber and the Prosecutor should use the same standard to determine whether an investigation is warranted.[47] The Majority observed that the phrase "reasonable basis to proceed" appears in both the paragraph governing the Prosecutor's conclusion that an investigation is appropriate and also in the paragraph governing the Chamber's review of the Prosecutor's request.[48] By tracing the various iterations of the Rome Statute, the Majority found support for its conclusion in the Statute's *travaux préparatoires,* or its legislative history, stating that "[h]ad the drafters intended different standards, they could have used different wordings."[49]

The Chamber also concluded that the "reasonable basis to proceed" test is the "lowest evidentiary standard [of the three evidentiary standards] provided for in the Statute."[50] Because the Statute does not define "reasonable basis to proceed," the Majority determined that an

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trate" of civil law systems rather than the adversarial prosecutorial attorneys of the common law. *See* SCHABAS, *supra* note 1, at 248.

[42] *See* Rome Statute, *supra* note 5, arts. 54(2)(a), 87.

[43] *See id.*, arts. 54(2)(b), 57(3)(d).

[44] *See id.* art. 54(3).

[45] *See id.* art. 17.

[46] *See id.* art. 17(1). This is called "complementarity" by the Court. *Kenya Situation,* Case No. ICC–01/09, ¶ 53.

[47] *Kenya Situation,* Case No. ICC–01/09, ¶¶ 21, 22.

[48] *See* Rome Statute, *supra* note 5, art. 15(3), (4); *Kenya Situation,* Case No. ICC–01/09, ¶¶ 21, 22.

[49] *See Kenya Situation,* Case No. ICC–01/09, ¶ 22; BLACK'S LAW DICTIONARY, *supra* note 8, at 1638.

[50] *Kenya Situation,* Case No. ICC–01/09, ¶¶ 27, 28 (citing three other evidentiary standards in ascending order of stringency: "reasonable grounds to believe"; "substantial grounds to believe"; and finally "beyond reasonable doubt").

independent analysis of the phrase was appropriate.[51] The court noted that the "standard should be construed and applied against the underlying purpose of the procedure in article 15(4) of the Statute, which is to prevent the [c]ourt from proceeding with unwarranted . . . investigations that could have a negative effect on its credibility."[52] Finally, the Majority concluded that, in evaluating the Prosecutor's request, "the Chamber must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the court has been or is being committed."[53] However, the evidence the Prosecutor proffers as support for his request "need not point towards only one conclusion."[54]

Having defined the "reasonable basis" standard, the Majority turned its attention to whether the post-election violence constituted a "crime within the jurisdiction of the [c]ourt."[55] For a crime to come within the court's jurisdiction, it must fulfill the following conditions: it must fall within the category of crimes referred to in article 5 of the Statute and defined in articles 6, 7, or 9 (jurisdiction *ratione materiae,* or subject-matter jurisdiction); it must fulfill the temporal requirements stated in article 11 (jurisdiction *ratione temporis,* or whether the Statute was in force in the State at issue at the time of the alleged crime); and it must meet one of two alternative requirements embodied in article 12—either jurisdiction *ratione loci* (whether the situation occurred in the territory of a State Party) or *ratione personae* (whether the accused is a national of a State Party).[56]

The Majority determined that the post-election violence in Kenya constituted a crime against humanity, falling within the subject-matter jurisdiction of the Court, and therefore there was a "reasonable basis" to proceed with the investigation.[57] The Statute defines crimes against humanity as any of the following acts committed as "part of a widespread or systematic attack directed against any civilian population:" murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, persecution, enforced disappearance, apartheid, and "other inhumane acts of similar character

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[51] *See id.* ¶ 29.
[52] *See id.* ¶ 32.
[53] *See id.* ¶¶ 34, 35
[54] *See id.* ¶ 34.
[55] *See id.* ¶ 36.
[56] *See Kenya Situation,* Case No. ICC–01/09, ¶¶ 38, 39.
[57] *Id.* ¶ 73.

intentionally causing great suffering."[58] Moreover, these acts must be in "furtherance of a State or organizational policy."[59] In interpreting this element, the Chamber looked at other international criminal tribunals, and concluded that organizations not linked to a State could commit a crime against humanity and that such crimes need not have been conceived at the highest levels of government.[60] After examining the available information, "bearing in mind the nature of the present proceedings" and the "low threshold," the Chamber concluded that crimes against humanity may have been committed, thus fulfilling the subject-matter jurisdiction requirement of the Statute.[61] Because Kenya is a State Party, and because the alleged crimes took place after the Statute came into force in Kenya's territory, jurisdiction *ratione temporis* and jurisdiction *ratione loci* were both also fulfilled and the Prosecutor's request was granted.[62]

C. *The Dissent's Analysis*

While condemning the violence, Judge Hans-Peter Kaul, writing for the Dissent, nonetheless opined that the ICC was not the right forum to try any potential crimes against humanity that allegedly occurred in Kenya.[63] He argued that there are two categories of international crimes:[64] "international crimes of concern to the international community as a whole," particularly genocide, crimes against humanity, and war crimes for which the ICC is the appropriate forum;[65] as well as common crimes, which, though serious, should be prosecuted by national criminal justice systems.[66] He emphasized that there exists a bright line between those two categories of crimes that should not be crossed without great thought because doing so might infringe on state sovereignty and turn the ICC, "which is fully dependent on State cooperation," into an institution that is "hopelessly overstretched" and inefficient.[67]

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[58] *See* Rome Statute, *supra* note 5, art. 7(1).

[59] *Id.* art. 7(2)(a).

[60] *Kenya Situation,* Case No. ICC–01/09, ¶¶ 89, 90, 91, 92.

[61] *Id.* ¶ 73.

[62] *See id.* ¶¶ 178, 179 (stating that because jurisdiction *ratione loci* had been fulfilled, the alternative basis to exercise jurisdiction—jurisdiction *ratione personae*—need not be examined).

[63] *See Kenya Dissent,* Case No. ICC–01/09, ¶ 6.

[64] *Id.* ¶ 8.

[65] *Id.*

[66] *Id.*

[67] *See id.* ¶¶ 9, 10.

In addition, while the "reasonable basis to proceed" standard is low,[68] Judge Kaul cautioned that the Statute nevertheless requires a "full, genuine, and substantive determination of the Chamber."[69] He argued that the procedural purpose of the Chamber's review was to protect the court's credibility, and that the Chamber must ensure that the court has jurisdiction over alleged crimes throughout the entire proceedings by refraining from satisfying the standard with "*any* information, of even fragmentary nature."[70] Thus, Judge Kaul suggested that the "reasonable basis" standard is not as low as the Majority argued, that is, the evidence need not point to only one conclusion at this stage, but should instead reasonably point to a conclusion that an exercise of the court's jurisdiction is warranted.[71] Finally, the Chamber is duty-bound to apply the standard equally and consistently to "all requirements falling under article 15," and "in particular in relation to the *ratione materiae* jurisdiction of the [c]ourt."[72]

Judge Kaul concluded that the post-election violence in Kenya was not a crime against humanity as defined in the Statute, and therefore did not fall under the subject matter jurisdiction of the court.[73] He argued that the "contextual elements of crimes against humanity" [were] inadequately explored.[74] While article 7 can be used to define "attack" broadly,[75] the contextual element enumerated in article 7(2)(a) calls for the attack to be in furtherance of a "State or organizational policy."[76] He argued that only the higher levels of government can establish a State policy.[77] As for "organization," Judge Kaul examined other translations of the Statute and noted that the English version is phrased more generously than other authentic versions.[78] The Statute, in other languages, requires that in order for the attack to fall under the ICC's jurisdictional

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[68] *Id.* ¶ 14.

[69] *See Kenya Dissent,* Case No. ICC–01/09, ¶ 14.

[70] *Id.* ¶ 15.

[71] *See id.* ¶ 18 ("I believe the Prosecutor must demonstrate his determination . . . and substantiate it with adequate material leading the Chamber to conclude that an authorization . . . is warranted.").

[72] *Id.* ¶ 17.

[73] *Id.* ¶ 4.

[74] *Id.* ¶ 18.

[75] *See* Rome Statute, *supra* note 5, art. 7(1)(k) (defining an attack as "other inhumane acts . . . causing great suffering or serious injury to body or to mental or physical health").

[76] *Id.* art. 7(2)(a); *Kenya Dissent*, Case No. ICC–01/09, ¶ 26.

[77] *See Kenya Dissent,* Case No. ICC–01/09, ¶ 43.

[78] *See id.* ¶¶ 37, 38 (quoting the French version as "la politique d'un Etat ou d'une *organisation,*" and the Spanish as "de conformidad con la política de un Estado o de una *organización,*" while the English says "pursuant or in furtherance of a State or organizational policy").

ambit, it must be authored by an entity like that of an organization, while the English version would accept "the meaning of a policy to be of a systematic nature but does not necessarily need [it] to be authored by an entity like that of an organization."[79] Read contextually and historically, moreover, Judge Kaul argued that the "organization" should have some characteristics of a State, and that entities such as "a mob" or a "[group] of armed civilians" do not reach the prescribed level to fulfill this requirement.[80] Thus, taking a more restrictive reading of the Statute,[81] Judge Kaul concluded that the violence in Kenya was not committed "pursuant to or in furtherance of a State or organizational policy," and therefore did not fall within the jurisdiction of the ICC.[82]

III. Analysis

By giving broad effect to the Prosecutor's *proprio motu* power, the Majority enhanced the effectiveness of the Court in prosecuting the terrible crimes it was created to fight.[83] For most of the Twenty-first Century, political authorities selected the situations to be prosecuted, while prosecutors could only select specific cases within those situations to try.[84] Prosecutors had no power to refuse to investigate the situation, nor could they decide to investigate beyond the jurisdiction given to them.[85] Political solutions to massive atrocities often resulted in impunity for the worst perpetrators.[86] For example, when Japan signed its final peace treaty with the Allies in San Francisco in 1951, it demanded that all Japanese prisoners held for war crimes be transferred to a central prison in Tokyo.[87] Indeed, Japan never recognized the legitimacy of

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[79] *Id.*

[80] *Id.* ¶¶ 51, 52.

[81] *See id.* ¶ 56.

[82] *See id.* ¶ 82 ("Local politicians, civic candidates or aspirants, councilors and business people meeting and allegedly financing the violence do not form an 'organization' . . . . Meetings during the time concerned point to *ad hoc* preparations . . . .").

[83] *See* Elizabeth C. Minogue, Comment, *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court,* 61 Vand. L. Rev. 647, 649 (2008) (arguing that in order for the ICC to act effectively, it must be able to carry out investigations and prosecute the accused).

[84] *See* Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice,* 40 Case W. Res. J. Int'l L. 215, 219 (2007–08).

[85] *Id.*

[86] *See id.* at 219–20 (citing Idi Amin Dada and Baby Doc Duvalier as examples of political leaders who committed crimes against humanity, but were pushed into "golden exile," rather than punished, as a result of political negotiations).

[87] M. Cherif Bassiouni, *The International Criminal Court in Historical Context,* 1999 St. Louis-Warsaw Transatlantic L. J. 55, 62 (1999).

its Post-World War II criminal tribunals, and by 1954, one of those convicted at the Tokyo War Crimes Trial became Prime Minister and another became Minister of Foreign Affairs.[88] The innovation of the Rome Statute's grant of *proprio motu* power to the Prosecutor, therefore, was to ensure that justice could prevail over any political decision by introducing an independent judicial actor to monitor, and prosecute horrendous international crimes.[89]

By setting the "reasonable basis to proceed" standard as low as it did, the Majority created the possibility for active, independent Prosecutors to use the office as a means to ensure that perpetrators of international crimes cannot escape with impunity.[90] At the outset, merely knowing that a vigilant Prosecutor exists might deter those crimes from happening in the first place because, if such a crime were to occur, the Pre-Trial Chamber would likely authorize an investigation at the Prosecutor's request.[91] For this purpose, the Office of the Prosecutor created a Jurisdiction, Complementarity and Cooperation Division to assess all communications received regarding crimes, to examine documents describing such crimes, and to advise the Prosecutor on which crimes to investigate.[92] Secondly, if a crime were to be committed, the threat of independent ICC investigation or ICC assistance would encourage national judicial systems to undertake investigations themselves.[93] Finally, when a state is unable or unwilling to investigate alleged crimes that are within the court's jurisdiction, a low "reasonable basis to proceed" standard would allow the Prosecutor to gather more information about the situation, which in turn would allow the Prosecutor to assess whether a full prosecution is warranted.[94] If a prosecution is appropriate, the court

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[88] *Id.*

[89] *See* Moreno-Ocampo, *supra* note 84, at 220. *But see* Alexander K.A. Greenwalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court,* 39 N.Y.U. J. Int'l L. & Pol. 583, 633, 660 (2007) (arguing that the Prosecutor cannot make charging decisions without undertaking "complex political calculations" that the ICC was designed to avoid, particularly in post-conflict situations where the state at issue is attempting transitional justice, and that the Prosecutor should yield to political actors with equal legitimacy in those cases).

[90] *See* Moreno-Ocamp, *supra* note 84, at 220.

[91] *See* Rome Statute, *supra* note 5, art. 15; Moreno-Ocamp, *supra* note 84, at 220.

[92] *See* Moreno-Ocampo, *supra* note 84, at 220; *Office of the Prosecutor, supra* note 27.

[93] *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice,* 49 Harv. Int'l L.J. 53, 54 (2008) (calling for the ICC to adopt "proactive complementarity," a policy in which the ICC would cooperate with national governments while using political leverage to encourage states to undertake their own prosecutions).

[94] *See* Rome Statute, *supra* note 5, art. 54; Situation in the Republic of Kenya, Case No. ICC–01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of

will therefore be in a better position to issue an arrest warrant, and perpetrators of the worst international crimes would be called to account.[95] Thus, the court would be able to achieve its goals more effectively.[96]

The benefits of having a low "reasonable basis to proceed" standard would therefore outweigh any threats to the court's credibility because there are judicial, political, and procedural controls on the Prosecutor to curtail him should he abuse his *proprio motu* initiative.[97] The fact that the Pre-Trial Chamber must approve an investigation initiated via the Prosecutor's *proprio motu* power provides a measure of judicial oversight and would deter flagrant abuses of prosecutorial discretion.[98] Moreover, the Prosecutor is politically accountable to the Assembly of States Parties, who elects him, and may remove him for cause.[99] More subtly, States themselves exercise implicit political control by refusing to cooperate with the ICC or its Prosecutor.[100] Procedurally, even though the Majority read the Statute and the "reasonable basis to proceed" standard broadly, the standard is not without substance.[101] The Prosecutor is still bound to gather information and analyze "the seriousness of the information received" before requesting an investigation.[102] Thus, any threats to the court's credibility should be ameliorated by these checks on the Prosecutor.[103]

Conclusion

In allowing the Prosecutor to proceed with his *proprio motu* investigation in Kenya's post-election violence, the ICC read the "reasonable basis to proceed" standard broadly. Despite the Dissent's objection, doing so is salutary because it permits the Prosecutor to pursue the goals

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an Investigation into the Situation in the Republic of Kenya (*Kenya Situation*), ¶¶ 21, 22 (Mar. 31, 2010).

[95] *See Kenya Situation,* Case No. ICC–01/09, ¶ 73.

[96] *See* Rome Statute, *supra* note 5, art. 1.

[97] *See* Danner, *supra* note 33, at 522–27 (dividing controls on the Prosecutor's discretion between formal and pragmatic methods of accountability). *But see* Situation in the Republic of Kenya (*Kenya Dissent*), Case No. ICC–01/09, Dissenting Opinion of J. Hans-Peter Kaul ¶ 15 (Mar. 31, 2010) (discussing the deleterious effect of the Court's credibility if the Prosecutor has unchecked discretion).

[98] *See* Danner, *supra* note 33, at 524.

[99] Rome Statute, *supra* note 5, art. 46; Danner, *supra* note 33, at 524.

[100] *See* Danner, *supra* note 33, at 527 ("A more potent . . . form of state control over the Prosecutor lies in the Court's powers relating to international cooperation and judicial assistance.").

[101] *See Kenya Situation,* Case No. ICC–01/09, ¶ 35.

[102] Rome Statute, *supra* note 5, art. 15.

[103] *See id.*; *Kenya Situation,* Case No. ICC–01/09, ¶ 35; Danner, *supra* note 33, at 527.

of the court more effectively. Formal and informal checks on the Prosecutor serve as an appropriate restraint on any abuse of the Prosecutor's *proprio motu* initiative. While there are still many challenges for the court remaining, crippling the Prosecutor at this early stage of the court's development would only permit perpetrators of the worst kinds of international crimes to escape accountability.